STATE OF MICHIGAN

COURT OF APPEALS

ORETTA TODD,

Plaintiff-Appellant,

v

COMERICA BANK, Personal Representative of the Estate of CHUK NWOKEDI, M.D.,

Defendant-Appellee.

UNPUBLISHED
May 22, 2003

No. 237415
Oakland Circuit Court
LC No. 2000-024203-CZ

Before: Cooper, P.J., and Sawyer and Murphy, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(7). We affirm.

Following a long-term personal relationship, plaintiff and defendant's decedent agreed to be married on November 10, 1999. They made final plans to sign a prenuptial agreement on November 4, 1999. Unfortunately, the decedent died on November 2, 1999. Plaintiff filed a claim against the decedent's estate, which defendant disallowed. Plaintiff subsequently commenced this action, alleging counts for "Reimbursement for Services," "Support," "Breach of Contract," "Quantum Meruit," "Debt," and "Recovery of Goods."

Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(7), (8) and (10). Defendant argued, in part, that plaintiff's claims were barred by former MCL 700.717(1)[1]

[1] This statute, which was repealed by 1998 PA 386, § 8101, effective April 1, 2000, provides, in pertinent part:

> A claim that is disallowed in whole or in part by the personal representative is barred to the extent not allowed unless the claimant files a petition for allowance in the court or commences a proceeding against the personal representative not later than 63 days after the mailing of the notice of disallowance or partial allowance if the notice warns the claimant of the impending bar.

because plaintiff's action was filed more than sixty-three days after the mailing of the notice of disallowance of claim. In support of its motion, defendant submitted a copy of the notice of disallowance with the proof of service indicating that the notice was mailed on April 25, 2000. Plaintiff's action was filed on June 29, 2000. The parties agree that if the mailing occurred on April 25, 2000, then the action was untimely under former MCL 700.717(1).

The trial court granted defendant's motion, noting that plaintiff failed to present any evidence disputing defendant's evidence that the notice of disallowance was mailed on April 25, 2000, and, therefore, that plaintiff's action was untimely under former MCL 700.717(1).

Plaintiff now argues that the trial court erred in granting defendant's motion because there was a disputed issue of fact concerning the date the notice of disallowance was mailed. We disagree.

When considering a motion for summary disposition pursuant to MCR 2.116(C)(7), the contents of the complaint are accepted as true unless contradicted by documentary evidence submitted by the movant. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). Here, plaintiff's complaint alleged that defendant disallowed her claim on April 25, 2000. Consistent with the allegation in the complaint, the proof of service submitted by defendant indicated that the notice was mailed on April 25, 2000. Plaintiff did not submit any evidence contradicting this date in response to defendant's motion.[2]

On appeal, plaintiff argues that an affidavit from her attorney concerning her recollection of the date of the postmark on the notice of disallowance demonstrates that a material factual dispute exists regarding the date of mailing. However, this affidavit was not submitted until after the court had both granted defendant's motion and denied plaintiff's motion for rehearing. Because it was not part of the record that was presented to the trial court when ruling on defendant's motion, we do not consider it. See *Maiden, supra* at 126 n 9; *Quinto v Cross & Peters Co*, 451 Mich 358, 366 n 5; 547 NW2d 314 (1996).

Plaintiff also argues that there was a disputed issue of fact regarding the date of mailing because, on another occasion, defendant submitted an inaccurate proof of service. Because this argument and supporting evidence was first presented to the court with plaintiff's motion for rehearing, it will not be considered in our review of the trial court's grant of summary disposition. *Maiden, supra*; *Quinto, supra.* In any event, the argument is flawed because the proofs of service were prepared by different individuals working for different entities. The alleged inaccuracy by a law firm in one instance does not create a factual dispute concerning the accuracy of the proof of service submitted by defendant in this matter.

Finally, plaintiff suggests that discovery of records from defendant's postage machine would show the date of the postmark and that summary disposition was therefore premature. Plaintiff was on notice that the timeliness of the action was at issue because defendant referred to

[2] In her motion for rehearing, plaintiff argued that her attorney's statements at oral arguments should have been treated as the equivalent of sworn testimony. The trial court rejected that argument, noting that plaintiff provided no authority in support of her position. Plaintiff does not challenge this ruling on appeal.

the statute of limitations as one of its affirmative defenses in September 2000. Further, defendant's motion for summary disposition was filed on July 18, 2001, and discovery did not end until July 31, 2001. Thus, even if plaintiff did not anticipate defendant's reliance on former MCL 700.717(1), plaintiff still had time to request discovery on the issue of the mailing after defendant's motion was filed. There is no indication that plaintiff made any effort to do so, nor did plaintiff seek additional time for discovery in her response to defendant's motion. She first suggested that additional discovery was necessary in her motion for rehearing, but did not support the request with evidence. See *Village of Dimondale v Grable,* 240 Mich App 553, 566; 618 NW2d 23 (2000) (a party opposing a motion for summary disposition on the ground that discovery is incomplete must at least assert that a dispute does indeed exist and support the allegation by some independent evidence). Having failed to obtain discovery on the issue while discovery was open, having failed to request reopening of discovery in her response to defendant's motion, and having failed to submit evidence in support of her request for additional discovery in her motion for rehearing, plaintiff will not now be heard to complain that summary disposition was premature because discovery was incomplete.

Because plaintiff failed to show a factual dispute upon which reasonable minds could differ concerning whether plaintiff's action was barred by former MCL 700.717(1), the trial court did not err in granting defendant's motion for summary disposition. *Jackson Co Hog Producers v Consumers Power Co,* 234 Mich App 72, 77; 592 NW2d 112 (1999).

Affirmed.

/s/ Jessica R. Cooper
/s/ David H. Sawyer
/s/ William B. Murphy